No. 15,230

IN THE

United States Court of Appeals

For the Ninth Circuit

MORGAN STIVERS,
Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a corporation, et al.,
Appellees.

BRIEF OF APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

STATEMENT OF PLEADINGS.

The *complaint* sets forth eight alleged causes of action based on insurance contracts executed in the State of California by Appellees Girard Insurance Company, (hereinafter referred to as "Girard"); National American Insurance Company, (hereinafter referred to as "National"); Queen Insurance Company, (hereinafter referred to as "Queen"); and Insurance Company of the State of Pennsylvania, (hereinafter referred to as "State"), which are citizens of a state other than the State of California, to

Appellant Morgan Stivers, who is a citizen of the State of California.

In the *first, third, fifth and seventh alleged causes of action,* Appellant seeks to recover from Appellees various amounts of money, allegedly due Appellant under the terms of the respective written insurance contracts executed by each Appellee, whereby Appellant was insured against loss or damage by fire to a packing plant consisting of a packing house and platforms, equipment, field boxes and supplies and storage building, all situated at Side Station 3 miles north of Lindsay, Tulare County, State of California (4, 8, 13, 18).*

Appellant alleged that on October 13, 1954, such buildings and personal property were destroyed by fire; that Appellant's loss thereby was $166,642.00 and that about December 21, 1954, Appellant delivered a Proof of Loss to each Appellee; that Appellant duly performed all of the conditions of said written insurance contracts on his part; and that the sum of $40,000.00 is due, owing and unpaid from Appellees to Appellant on account of such loss (5-7).

In the *second, fourth, sixth and eighth* alleged causes of action, Appellant seeks to recover on the basis of a waiver of the occupancy conditions of said written insurance contracts by which the insurance was suspended if the packing house was permitted to remain unoccupied, but not vacant, in excess of 10 consecutive months. Appellant alleges that Appellees

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*Arabic numerals herein refer to the page of the Transcript of Record.

orally agreed to and he hired and maintained a watchman on said premises at all times after the issuance of said insurance contracts and until said fire in lieu of occupancy (7, 12, 16, 21).

In its respective *answer,* each Appellee admitted the execution of its respective written insurance contract, the occurrence of this fire, the filing of the proof of loss, and that nothing has been paid on account of such loss. Each Appellee denied that Appellant had fulfilled the occupancy conditions of its written insurance contract on his part to be performed or that Appellee waived such occupancy conditions or consented to a watchman in lieu of the occupancy provisions of its contract (55, 57, 61, 66, 72).

II.

STATEMENT OF THE CASE.

Effective the 1st day of December, 1952, for a premium based upon rates fixed by the Pacific Fire Rating Bureau with the subject of the insurance occupied (192, 208-209), each Appellee executed to Appellant a standard written form of California fire insurance policy, as set forth in Ins. C. Section 2071, and attached thereto a written standard form of building, equipment and stock endorsement Form 78 (Ex. 1, 2, 3 and 4, T. 111), whereby each Appellee insured an orange packing plant, consisting of the following buildings and personal property in the following amounts:

	Item 1 Parking House and Loading Platform	Item 2 Equipment	Item 3 Stock	Item 5 Storage Building
(1) Girard	$5,000	$5,000	nil	nil
(2) National	5,000	nil	$1,500	$1,500
(3) Queen	5,000	2,500	2,000	500
(4) State	3,000	5,000	1,500	500
Total	$18,000	$12,500	$5,000	$2,500

By express provision of Building, Equipment and Stock Endorsement Form 78, said Item 1 (Packing House and Loading Platform) was insured "while occupied as Packing House and Loading Platform"; Item 2 (Equipment) pertaining to insured's occupancy "only while contained in, on or attached to the above described building"; Item 3 (Stock) consisting principally of field supplies and boxes all, only, while contained in, on or attached to the above described building"; and Item 5 (Storage) "On storage building situate: on above described premises".

Such California standard fire insurance contracts provided, in part, as follows:

(1) Lines 149-152:
"Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with."

(2) Lines 28-34:
"Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto

this Company shall not be liable for loss occurring . . . (b) *while a described building,* whether intended for occupancy by the owner or tenant is vacant or unoccupied beyond a period of 60 consecutive days; . . ." (Emphasis supplied.)

(3) Lines 46-51:

"Waiver Provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein."

Paragraph 21 of said Building, Equipment and Stock Form 78 provided, in part, as follows:

"Vacancy—Unoccupied Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: . . .; (2) If the *subject of insurance (whether building or contents or both)* is a cannery, fruit, nut or vegetable packing or processing plant . . . permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify *any provision* or warranty of this policy *requiring* (1) the maintenance of *watchman* service." (Emphasis supplied.)

Prior to the execution of such written insurance contracts, Appellant through his nephew (121), Truman B. Stivers (hereinafter referred to as

"Nephew") represented to Appellees that the Packing House and Loading Platform was occupied, as follows:

(a) On October 29, 1952, at the request of Appellant, Clara Heysler (authorized employee of Appellant's Nephew) (153, 154) executed and delivered a written application to Appellees National and Girard, wherein the described occupancy was expressly stated for a "Packing House and Loading Platform" (208-209, Ex. H and C, 166-167), and did not state the packing plant would not be operated.

Upon receipt of such application, Appellee National applied in writing to the Pacific Fire Rating Bureau for a rate based on occupancy as a citrus packing shed and loading platform (Ex. J, 231-236).

(b) Likewise, at the request of Appellant, Nephew's office telephoned Roy A. McMillan to renew the expiring policies in State and Queen (242). According to McMillan's knowledge the Packing House and Loading Platform was occupied, and he was not informed that the packing plant was not to be operated. McMillan, in turn, notified Appellees State and Queen of the occupancy and requested each of them to renew its policy (244-245). McMillan did not receive any information from Appellant that there was any unoccupancy or that there would be no operation as a packing plant (243).

The insured property was classified as Class "D," which is the classification for property in an unprotected fire area (231), and the rate published by the

Pacific Fire Rating Bureau for an occupied premises was applied (Ex. J, 209, 236, 256, Ex. 1, 2, 3 and 4).

At the time it executed its said written insurance contract, each Appellee believed the Packing House was occupied and operated as a citrus fruit packing house, and it had not been told by Appellant of any unoccupancy or that there would be no operation as a packing plant (209, 215, 252, 254).

Since 1949, Nephew has been Appellant's agent taking care of all of Appellant's insurance (117, 122, 125).

Nephew was not an agent for Appellee Queen or State (135, 189).

After the policies were executed and delivered to Nephew and Appellant, neither Appellant nor Nephew made any objection to such written insurance contracts (247, 136, 138).

III.

SUMMARY OF ARGUMENT.

A reading of Appellant's "specification of errors" shows that this appeal is based upon the ground that the evidence was insufficient to support the findings of the trial Court that the insurance contracts were suspended by reason of the unoccupancy of the packing house, or that Nephew was an agent of Appellant. Therefore, the only issue before this Court is a question of fact as to the sufficiency of the evidence to support such findings.

It is settled law that even though there is a conflict in the evidence, this Court will assume as true the view of the evidence most favorable to Appellee; and the findings of fact of the trial Court are presumptively correct and its findings should not be disturbed unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

To support the Court's findings that the insurance contracts were suspended at the time of the fire, the evidence shows that the insured property was an orange packing plant which was unoccupied for more than 10 consecutive months prior to the fire. The evidence was insufficient to show that Appellant complied with the occupancy provisions of the insurance or to establish a waiver of such occupancy provisions.

It is the position of Appellees that the evidence is sufficient to support the Court's findings of such unoccupancy, and that the Nephew was an agent for Appellant, and such findings are not clearly erroneous.

IV.

ARGUMENT.

A. CALIFORNIA LAW APPLICABLE.

Since the subject contracts were made in the State of California, the law of the State of California is applicable,

Exchange Lemon Products Co. v. Home Ins. Co. (1956 9th Cir.) 558, 561;

Van Meter v. Franklin Fire Ins. Co. (1947 9th Cir.) 164 F. 2d 325.

B. BURDEN OF PROOF UPON APPELLANT.

1. To establish findings clearly erroneous.

This Court has repeatedly stated the rule is well settled that an Appellate Court cannot disturb findings of the trial Court based on conflicting evidence taken in open Court except for clear error.

Where there is a conflict in the evidence the findings of the trial Court are presumptively correct and should not be disturbed unless clearly erroneous. Findings of fact are to be accepted as true, even where the Appellate Court is convinced it would have found otherwise upon the evidence. Unless there is clear error in a finding, the finding of a trial Court is conclusive.

Hartford Accident & Indemnity Co. v. Jaspers (1944 9th Cir.) 144 Fed. 2d 266, 267;

Rule 52a of the Federal Rules of Civil Procedure;

Wingate v. Bercut (1944 9th Cir.) 146 F. 2d 725.

On an appeal, even though there is a conflict in the evidence, this Court will assume it true in view of the evidence most favorable to Appellee.

Wilmington Transportation Co. v. Std. Oil Co. (1931 9th Cir.) 53 F. 2d 787.

2. To prove occupancy.

When the subject of an insurance contract is a fruit packing plant "while occupied" and provides that the insurer shall not be liable for a loss occurring while a building is unoccupied beyond a period of 10 consecutive months, the burden of proof is upon the in-

sured to allege and prove that the building was occupied; otherwise, the insured cannot recover as such occupancy is an essential element of his insurance contract,

Nat'l. Reserve & Ins. Co. v. Ord (1941 9th Cir.) 123 Fed. 2d 73—packing house, *wherein* the Court stated:

"Unless the provision that the insurance covered the building while occupied only for packing plant purposes is negatived by a rider on the policy . . . insured under the controlling California law, was not entitled to recover."

Northwestern Nat'l. Ins. Co. v. McFarlane (1931 9th Cir.) 50 Fed. 2d 539;

Allen v. Home Ins. Co. (1901) 133 Cal. 29, 32; 65 P. 138—wherein the Court stated:

"It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house . . . The allegation was not merely a condition precedent, as referred to in Section 457 of the Code of Civil Procedure. It went to the very essence of plaintiffs' right to recover."

Arnold v. American Ins. Co. (1906) 148 Cal. 660; 84 P. 182;

Walker v. Mechanics Ins. Co. (1931) 119 C.A. 243, 245; 6 P. 2d 355.

3. To establish waiver.

Gawecki v. Gen. Ins. Co. of Am. (1948 9th Cir.) 167 Fed. 2d 894, affirming 72 F. Supp. 430;

Aronson v. Frankfurt Accident & Plate Glass Ins. Co. (1908) 9 C.A. 473, 480; 99 P. 537—

wherein the Court stated:

"A waiver in law is the intentional relinquishment of a known right; and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain."

(a) Insurer authorized to limit authority of an agent.

Belden v. Union Central Life Ins. Co. (1914) 167 Cal. 740, 743; 121 P. 370.

(b) No agent has authority to waive any provision of the policies except by writing endorsed thereon or attached thereto.

Such limitation of authority is mandatory under the laws of the State of California,

Insurance Code 2071;

Wilson v. Maryland Casualty Co. (1937), 19 Cal. App. 2d 463, 465; 65 P. 2d 903.

(i) Restriction of authority to waive is valid.

In *Gawecki v. Dubuque Fire and Marine Insurance Co.* (1947, Cal. S.D.) 72 F. Supp. 430, 431, it was stated:

"Hargett v. Gulf Insurance Company, 1936, 12 Cal. App. 2d 449, 55 P. 2d 1258 and cases therein cited, dating back to Steil v. Sun Insurance Company, 171 Cal. 795, 155 P. 72, decided in 1916, and which has been followed ever since. See also, Cinema Schools v. Westchester Fire Insurance

Co., D. C. Cal., 1932, 1 F. Supp. 37, and Cinema Schools v. Federal Union Insurance Co., D. C. Cal., 1932, 1 F. Supp. 42, both decided by Judge John Knox of the Southern District of New York, while sitting in this district. See also, Sun Insurance Office v. Scott, 1931, 284 U. S. 77, 52 S. Ct. 72, 76 L. Ed. 229. There has been no waiver of this condition by any agent of either company authorized to make such waiver. See the above cases and the opinion of our late colleague Ralph E. Jenney, in Alexander v. General Insurance Co. of America, D. C. Cal., 1938, 22 F. Supp. 157."

"What is more, such mere knowledge without more was not effective as a waiver of the condition. For the policies distinctly provided for the only manner of waiving conditions in them."

Wilson v. Maryland Casualty Co. (1937) 19 C.A. 2d 463, 465; 65 P. 2d 903;

Northwestern Nat'l. Ins. Co. v. McFarlane (1931 9th Cir.) 50 F. 2d 539;

Eddy v. National Union Indemnity Co. (1935 9th Cir.) 78 F. 2d 545, 547—rehearing 80 F. 2d 284.

(c) Upon receipt and acceptance of insurance policies, appellant charged with knowledge of its terms, including the limitation of the power to waive.

Belden v. Union Central Life Insurance Co. (1914) 167 Cal. 740, 743; 121 P. 370.

(d) Knowledge of conditions suspending insurance does not constitute waivers.

Conditions which render a policy void ab initio must be distinguished from conditions which only

suspend insurance during the period of violation. Where the insurance is suspended, the knowledge of an agent does not constitute a waiver,

Steil v. Sun Ins. Co. (1916) 171 Cal. 795, 802; 155 P. 72;

Rizzutto v. National Reserve Ins. Co. (1949) 92 C.A. 2d 143, 147; 206 P. 431, wherein the Court stated:

"It is settled by the case of *Steil v. Sun Ins. Co.* 171 Cal. 795 (155 P. 72) that a violation such as that in this case does not render the policy void ab initio. The insurance is simply suspended for the duration of such departure or violation. The Steil case holds that the insurance clause completely protects the insurer but does so without going to the extent of voiding the policy."

In *Keys v. Northwestern Nat. Ins. Co.* (1924 Cal. S.D.) 16 F. 2d 798, at 799:

"The insurer was not bound to cancel the policies upon notice of change of use, but had the right to assume that the insured, mindful of the suspension clause of the contract, might return the building to its use as a dwelling house, and so restore the binding effect of the policy at any time."

C. INSURANCE AGENT MAY BE AGENT OF INSURED AS WELL AS INSURER, THEN HIS KNOWLEDGE IS KNOWLEDGE OF THE INSURED.

An insurance agent may be an agent of the insured as well as the insurer, and in that event the agent's knowledge is the knowledge of the insured.

In *Holbrook v. Baloise Fire Ins. Co.,* 117 Cal. 561, 567; 49 P. 555, which was an action on a fire insurance policy, Henderson as a broker for plaintiff and McMahan negotiated a loan from plaintiff to McMahan which was secured by a mortgage from McMahan to plaintiff. As an insurance agent for defendant, Henderson applied for the insurance from defendant to McMahan and plaintiff (Mortgagor—Mortgagee), which defendant issued, containing a provision making the policy void if the insured procured other insurance on the same policy. Then, Henderson obtained a policy from the Insurance Company of North America. Held: Reversed judgment for plaintiff, and directed trial Court to enter judgment for defendant on findings, stating:

> "It is true the court found that McMahan 'had no actual personal knowledge' of its issuance; but considering the other facts found this must be held to mean no more than what it literally imports—that he had no knowledge thereof derived from the immediate exercise of his own sense; . . . If these facts do not show that McMahan had actual notice of the Baloise policy, they at least show that Henderson was the agent of McMahan to whom the latter committed the matter of obtaining the same, and that Henderson's knowledge of the issue thereof must be imputed to McMahan."

D. INSURANCE AGENT REQUESTING INSURANCE FROM AN INSURER HE DOES NOT REPRESENT IS AGENT OF THE INSURED.

Detroit Trust Co. v. Transcontinental Ins. Co. (1930) 105 C. A. 395, 400; 287 P. 535, which followed

Solomon v. Federal Ins. Co. (1917) 176 Cal. 133, 138; 167 P. 859, where the Court stated: "It is well settled that . . . where . . . an insurance agent requests insurance from a company which he does not represent he is acting for the insured . . ."

E. INSURED'S AGENT'S KNOWLEDGE OF INSURANCE AND TERMS OF POLICY IS KNOWLEDGE OF THE INSURED.

Eagle Star & Brit. Dominion v. Paddock (1938, D. C. C.) 22 F. Supp. 545, 548;

Strangio v. Consolidated Ins. Co. (1933 9th Cir.) 66 Fed. 2d 330.

F. WITNESS WILFULLY FALSE SHOULD BE REJECTED.

A witness false in one part of his testimony is to be distrusted in others. The whole testimony of a witness who has wilfully testified falsely as to a material point may be rejected,

Code of Civil Procedure, State of California, Section 2061.

Such well recognized rule was undoubtedly applied by the trial Court.

G. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDINGS (PARS. X (90), XIV, XV (92), XVIII (93)) INSURANCE SUSPENDED AT TIME OF FIRE BECAUSE THE PACKING PLANT WAS NOT OCCUPIED AS CONTEMPLATED BY THE TERMS OF THE INSURANCE.

1. The subject of the insurance was an orange packing plant.

It is uncontradicted that the subject of the insurance was an orange packing plant consisting of said orange packing house and loading platform, storage building, cull bin and all the equipment necessary to operate a packing house (102, 109, 178). When Nephew's employee Mrs. Clara M. Heysler telephoned Appellee she described the property as a packing plant (154-155). Throughout the trial of this action, Counsel for Appellant referred to the subject of insurance as "packing plant property" (203, 197, 193-194, 178, 155, 145, 130, 116, 113).

2. Unoccupancy suspends the insurance.

By the express provisions of the Standard California fire insurance policy, Ins. C. 2071 (Ex. 1-4, inclusive), at lines 28-34 the insurance is suspended:

> "Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring . . .; or (b) *While a described building,* whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 days; . . ." (Emphasis supplied).

Paragraph 21 of said Building, Equipment and Stock Endorsement No. 78 extends the period of unoccupancy for a fruit packing plant "not to exceed 10 consecutive months."

"VACANCY—UNOCCUPIED CLAUSE: Permission is granted to remain vacant or unoccupied without limit of time, EXCEPT AS FOLLOWS: . . . (2) If the subject of insurance (*whether building or contents or both*) is a cannery, fruit, nut or vegetable packing or processing plant, . . . permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied BUT NOT VACANT for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of *watchman* service; . . ." (Emphasis supplied.)

(a) Occupancy provision is to prevent consequent increase in risk from unoccupancy.

"It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites shelter to wanderers and evil-disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and, for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire . . ."

Moore v. Phoenix Ins. Co. (1886) 64 N. H. 140, 6 Atl. 27, 32.

This plant was in an unprotected fire area (231), along a railroad right of way, where strangers sought entrance into the packing house (222).

(b) Unoccupancy provisions are clear, consistent and unambiguous.

These provisions are mandatory under the law of the State of California, Ins. Code 2071. No California or Ninth Circuit decision has ever stated the Unoccupied Provisions were ambiguous. As pointed out in *Nat'l. Reserve Ins. Co. v. Ord* (1941, 9th Cir.) 123 F. 2d 73, 75, because such provisions are clear:

> "Our construction of the policy is confined to its terms."

In considering the phrases "while occupied as" and "only while occupied as", *Connecticut Fire Ins. Co. v. Buchanan* (1905, 8th Cir.) expressly stated:

> "One of the policies insured the building as a 'normal school and dwelling', and the other insured it 'occupied and only while occupied as a normal school and dwelling.' . . ."
>
> "These provisions are consistent, certain and unambiguous, and counsel for the insured do not even suggest that they are otherwise. The difference in the two policies is one of words only, not of meaning or legal effect. Both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk. Words could hardly have been chosen to better or more certainly express the purpose of the parties to exclude liability on the part of the insurers for any loss occurring when the building was without the care, supervision, and protection involved in such use and occupancy."

Likewise, the express provisions of the insurance policies in this action relating to unoccupancy are clear, consistent, and certain provisions.

In the words of the trial Court, the Honorable Ben Harrison:

> "One of the contentions made by the plaintiff is that liability was not suspended because the premises were not insured as a fruit packing plant. Plaintiff refers to the fact that in none of the policies of insurance is there a complete description of the packing plant; it is not described with specificity as a fruit packing plant. Both the insurer and the insured knew that it was not operating thus making the occupancy clause inoperative."
>
> "There is no dispute that the property including machinery and equipment was geared for operation as a citrus fruit packing plant. It had in fact in the past been used as such. The contention made by the plaintiff that the description of the premises on the individual insurance policies is controlling is without merit in that the subject of insurance was as a matter of fact a fruit packing plant and under such circumstances it is proper to look at the subject of insurance rather than the title on the respective insurance policies. The status of the insurance is not changed by a description on the policy.
>
> "A contract should be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting (Cal. Civ. Code Sec. 1636) and a fire insurance policy should be construed in like manner to cover the subject matter intended. Appleman, Insurance Law & Practice, Vol. 4, p. 174. A 'packing house' is used

to pack 'something', in this case citrus fruit and a common-sense interpretation of the contract results in it being a policy to insure a fruit packing plant. (See Cal. Civ. Code Sec. 1644)."

3. Occupancy means operating as a fruit packing plant.

As expressed in *Sternberg v. Merchants Fire Assur. Corp.* (1934) 6 F. Supp. 541—Hotel,

> "If a mercantile establishment, a mercantile business must be carried on therein; if a factory, it must be operated as a factory; if a barn it must be used as barns are ordinarily and customarily used; if a hotel, it must be used and operated as a hotel."

Likewise, if a packing plant, it must be used and operated as a packing house,

> *National Reserve Ins. Co. v. Ord* (1941 9th Cir.) 123 Fed. 2d 73—packing house;
>
> *Northwestern Nat'l. Ins. Co. v. McFarlane* (1931 9th Cir.) 50 Fed. 2d 539—dwelling.

(a) Appellant had full knowledge (actual and imputed) of occupancy requirements.

As early as 1949 or 1950, Appellant knew that if the packing plant was not operated, there would be no insurance protection under the written insurance contracts (142-143).

Appellant received and accepted the subject insurance contracts and is chargeable with knowledge of said occupancy provisions,

> *Belden v. Union Central Life Ins. Co.* (1914) 167 Cal. 740, 743; 141 P. 370.

Likewise, Nephew is chargeable with full knowledge of the occupancy provisions in the subject insurance contracts (183). Further, as to Appellees Queen and State, Nephew was the agent of Appellant as a matter of law,

Detroit Trust Co. v. Transcontinental Ins. Co. (1930) 105 C.A. 395, 400; 297 P. 535;

Solomon v. Federal Ins. Co. (1917) 176 Cal. 133, 138; 167 P. 589.

4. Admitted no operation for more than 10 consecutive months prior to fire.

The packing plant was not operated during the term of the insurance contracts (110).

5. Occupancy of the packing house determines the occupancy of the storage building.

The insurance contracts referred to the subject of the insurance being unoccupied, such as the packing house; and the occupancy of the packing house determines the character of the storage house and other buildings used in connection with it.

See: *Farmers Fire Ins. Co. v. Farris,* 1955, 224 Ark. 736; 276 S.W. 2d 44—where the Court stated:

"The status of the barn as regards vacancy or unoccupancy cannot be used to affect such status of the house. In other words, 'the tail cannot wag the dog.' In Appleman on 'Insurance Law & Practice', Vol. 4, p. 788, the rule as respects a house and barn being insured in the same policy, is stated as follows:

'. . . if the insurance is upon a farm dwelling and subordinate buildings, the occupancy of the dwelling determines the character of the occupancy of a barn and other outbuildings used in connection with it. The buildings could not, therefore, be considered unoccupied if the insured resides in the dwelling, it not being necessary that each of such outbuildings be used constantly; but if the dwelling has definitely been vacated, recovery may not be had for destruction of the other buildings.' "

(a) Occupancy of trailer house does not constitute occupancy of packing house.

The insurance contracts did not insure the premises but did insure the packing house, other buildings, stock and equipment. The insurance contracts do not refer to the premises being occupied. It is the status of the building and not the premises, that affects the occupancy provision.

See: *Rossini v. St. Paul Fire & Marine Ins. Co.* (1920) 182 Cal. 415; 188 P. 564.

Therefore, living in an unattached, uninsured trailer cannot be occupancy of the packing house.

See: *Farmers Fire Ins. Co. v. Farris,* 224 Ark. 736; 276 S.W. 2d 44—where the Court stated: "The rule stated by Appleman is correct. Here the insurance is on a farm dwelling and a barn, and the status of the barn as regards vacancy or unoccupancy cannot affect the status of the dwelling. Such is the vice in Appellee's Instruction No. 4.

. . . in the case at bar, the policy does not refer to the premises being vacant, but refers to a building

being vacant. Under the rule stated in Appleman, as aforesaid, the status of the barn as regards vacancy or unoccupancy cannot be carried over and imputed to the dwelling; and yet Instruction No. 4 so told the Jury."

6. A closed up building equipped to operate does not constitute occupancy.

The *terms "vacant" and "unoccupied"* as used in the Standard California fire insurance policy are not synonymous but are alternative terms. A building is vacant unless it contains the personal property (e.g., equipment, machinery, tools) ordinarily contained therein to enable the use of said building for the purpose for which it is adapted (citrus packing house). A building is unoccupied (but not vacant) if it contains such personal property but no packing operation is conducted therein. Such distinction was expressly recognized and approved in *Foley v. Sonoma County Farmer's Mutual Fire Ins. Co.* (1941) 18 C. 2d 232; 115 P. 2d 1:

> "A dwelling may be unoccupied even though it is not vacant; the terms are neither synonymous nor complementary. They are used in the present clause as alternatives and not in conjunction. The term 'vacant' is associated with removal of inanimate objects from a dwelling; the term 'unoccupied' is associated with the abandonment of that dwelling as a customary abode by its former occupants."

See:

Connecticut v. Buchanan (1905, 8th Cir.) 141 Fed. 877—where a normal school and dwelling shut down, leaving as storage a library

and household effects; a new lease had been executed but the tenant had not taken possession, but a former teacher visited the building twice a day.

Sternberg v. Merchants' Fire Assur. Corp. (1934 D. C. Wis.) 6 F. Supp. 541, 543—where a hotel shut down, leaving the furniture and equipment left in it, and the insured's son occupied one room while it was shut down, the Court stated:

"It cannot be that a complete suspension of use and occupancy of a residence, or a business, or a factory, can be adjudged to be contemplated beyond the policy limitation because of the hope or the expectation that, at some time there may or might be a renewal of the real and the declared occupancy. It cannot be sensibly held in a case like this that the parties contemplated in a dual sort of way (1) real occupancy and operation by a hotel business and (2) storage occupancy by the furniture and equipment between tenancies, regardless of the policy limitation."

7. Making repairs to a building does not constitute occupancy.

"When no one actually resides in a house, altering, repairing or the process of moving the building does not constitute occupancy."

Mauck v. Northwestern Nat'l. Ins. Co. (1929) 102 C.A. 510, 515; 283 P. 338.

While subdivision (c) of Paragraph 23 provides for repairs and alterations, as follows:

"(c) For the building(s) to be in course of construction, alteration or repair, all without limit

> of time but without extending the term of this policy, and to building additions thereto, and this policy, under its respective item(s), shall cover on or in such additions in contact with such building(s)";

it does not provide that repairs constitute occupancy.

California has recognized that unoccupancy and the making of repairs constitute separate perils to a building. Formerly, Ins. Code 2071 provided for each of them as follows:

> "Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring . . . (c) While mechanics or artisans are employed in building or altering or repairing the described premises for more than 15 days at any one time; . . . or (f) while a building; herein described whether intended for human occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; . . ."

Paragraph 21 of Building Endorsement was drafted to extend the period of unoccupancy. Paragraph 23 (c) thereof was drafted to permit repairs, regardless of occupancy, and there is no provision in the policy that making repairs will cure unoccupancy. To the contrary, *Mauck v. Northwestern Nat'l. Ins. Co.,* supra, points out that in the absence of occupancy of the building, repairs or alterations will not cure unoccupancy.

Therefore, Appellant did not sustain his burden of proof requiring him to comply with the occupancy provisions of the written contracts of insurance.

H. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDING (PAR. XVI (92)) NO WAIVER.

1. Nephew Truman B. Stivers not agent of Queen or State.

Admittedly, said Nephew was not an agent of Appellees Queen or State (189), and he did not talk to either Queen or State (188), and neither Queen nor State authorized him to act for it (189).

2. Neither Queen nor State knew there was unoccupancy or no operation.

Roy A. McMillan, agent for Queen and State was not told by Appellant, Nephew or Nephew's employee Clara M. Heysler that there would be no operation during the policy period (143, 243-244).

Agent Roy A. McMillan informed Queen and State in writing that the packing house was occupied (244-246), and the underwriters at Queen, R. F. Owen and State, David A. Hull, did not know there was unoccupancy or that the plant was or would not be operated (252-255).

3. Neither Girard nor National knew there was unoccupancy or no operation.

Nephew's employee Heysler did not tell Girard (160-161) or National (166-167) that the packing plant would not be operated. She told Girard:

> "it was the same packing plant they carried the insurance on and we were simply renewing it under the same conditions as far as I knew" (160);

and National that the occupancy was a packing plant (167).

Russell J. Baker of Girard (209) and George Donald of National (230-235) testified Nephew's office did not disclose any unoccupancy or that there would not be any operation.

4. Concern for rates may have caused Appellant and Nephew to conceal the fact the plant was not operated.

According to Berenice Zimmerman (Appellant's Office Manager), Nephew's employee Mrs. Florence Woods Dines informed her that "because the plant was non-operating, that the rates on the insurance would be higher" (147); and Mrs. Zimmerman so informed Appellant. Nephew's employee Mrs. Heysler's first telephone call to Appellee National was only on the subject of rates (154-155). When Nephew instructed Mrs. Heysler and Mrs. Woods concerning placing this insurance, Nephew was considering the rate to be charged (176-177).

5. Appellant's knowledge or notice prevents waiver or estoppel.

It is settled law that knowledge or notice (actual or imputed) on the part of Appellant of the occupancy or waiver provisions of the insurance will bar Appellant's claim that he was misled.

See: *Terminix Co. v. Contractors' State License Board* (1948) 84 C.A. 2d 167; 190 P. 2d 24;
W. J. Latchford Co. v. So. Calif. Gas Co. (1932) 125 C.A. 112, 114; 13 P. 2d 871;
Gridley v. Tilson (1927) 202 Cal. 748, 751; 262 P. 322.

(a) Appellant had knowledge (actual and imputed) of occupancy requirement and waiver provision of policy.

Appellant seeks to recover on policies, effective December 1, 1952, which were not only issued and delivered to him prior to December 1, 1952, but were renewal policies with the same occupancy and waiver provisions contained in the first policies Appellees Girard, Queen and State issued and delivered to Appellant, effective December 1, 1949. No objection was made to the original or renewal policies by Appellant.

Taff v. Atlas Assur. Co. (1943) 58 C.A. 2d 696, 703; 137 P. 2d 483.

In the absence of operating the packing plant, Appellant knew there would not be any insurance (142-143) or that the insurance would be in "jeopardy" (191). Appellant's office manager Berenice Zimmerman informed him that a watchman would have to be maintained at all times (149-150). Hence, Appellant has not been misled in any way by any Appellee.

(b) No evidence Appellant saw or knew of Nephew's letter of appointment (Ex. 5) from Appellee National or his agency contract (Ex. 6) with Appellee Girard.

There is no evidence in this record that Appellant knew of or ever saw such letter of appointment or agency. Obviously, he did not rely upon and was not misled by either document.

Files v. Derdenian (1919) 44 C.A. 256, 258; 186 P. 184.

The only written instrument Appellant saw was the insurance contracts which expressly limited his Nephew's authority to a written waiver either

"granted" in the policy itself or "expressed in writing added" thereto. And Appellant had actual and imputed knowledge of such limitation.

I. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDING (PAR. XVII (93)) NO WATCHMAN MAINTAINED AT ALL TIMES.

Assuming arguendo that which Appellees specifically deny that Appellant was authorized to use a watchman in lieu of occupancy provisions, or that Appellees waived such occupancy requirements, then Appellant did not perform the conditions on his part to be performed.

1. Watchman was to be maintained at all times.

Appellant's office manager for the past 10 years (152), Berenice Zimmerman admitted that Nephew's employee Mrs. Florence Woods Dines informed her prior to the effective date of the insurance contracts, that if the packing house was not operated, then there would have to be a watchman on the property at all times (149-150).* Said Zimmerman informed Appellant that he would have to have a watchman on the premises at all times; thereafter she informed Mrs. Dines that Appellant would do whatever was required to comply with the terms of the insurance contract (149-151). Mrs. Dines testified that Mrs. Zimmerman said:

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*Obviously such requirement was for the protection of and applicable to all the buildings and personal property, including the storage building.

"that they would have someone occupying the property at all times" (134).

2. No watchman maintained at all times.

Ruby Morris admitted that at the time of the fire and for several hours prior thereto, there was no watchman at the premises (224-226).

In fact, the Morris family did not have any access into the packing house (223). The Morris family consisted of Ruby Morris, her husband and a 16 year old son (222, 225). They had a house trailer situated about 50 feet from the packing house (222) and the Morrises paid their own lights (224). Edward L. Myers a neighbor of the Morrises stated that during the month and a half that the Morrises lived in this trailer, they worked away from the premises picking olives at Porterville (202, 203, 226), and they left between 6 and 7 A.M. each morning and would return between 3 and 5 P.M. (202, 203). On the morning of the fire Ruby Morris and her husband left the trailer to go to work to pick olives about 5 A.M. and returned about 4:30 to 5:00 in the afternoon (225, 202). Their 16 year old son was away picking olives the day of the fire (226) and he was not at the premises at the time of the fire (204).

In the absence of a continuous watch, the insurance is suspended during the watchman's absence.

See: *McKenzie v. Scottish Union & Nat'l. Ins. Co.* (1896) 112 Cal. 548; 44 P. 922—approved and followed in *Delta Lumber and Box Co. v. Lobugh* (1946) 64 F. Supp. 51, 52;

Shamrock Towing Co. v. American Ins. Co. (1925 2d Cir.) 9 Fed. 2d 57;

Home Insurance Co. v. Ciconett (1950 6th Cir.) 179 Fed. 2d 892;

Continental Ins. Co. v. Patton-Tully Transportation Co. (1954 5th Cir.) 212 F. 2d 543.

J. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDINGS (PARS. II (d), IV, V, VI AND VII (86-88)) NEPHEW WAS AGENT OF APPELLANT.

Since 1948, Nephew had been licensed to transact insurance in the State of California as an insurance agent (172). Thereafter, at all times Nephew had been Appellant's agent (125, 117), and had taken care of all of Appellant's insurance as Appellant's agent (122), placing over four million dollars of insurance for Appellant (176).

Further, Nephew was not an agent for either Appellee State or Queen (135, 189) and where an insurance agent requests insurance from a company he does not represent, he is the agent of the insured as a matter of law.

Detroit Trust Co. v. Transcontinental Ins. Co. (1930) 105 C.A. 395, 400; 287 P. 535, which followed

Solomon v. Federal Ins. Co. (1917) 176 Cal. 133, 138; 167 P. 859, where the Court stated:

"It is well settled that . . . where . . . an insurance agent requests insurance from a company which he does not represent he is acting for the insured . . ."

1. Insured's agent's knowledge of insurance and terms of policy is knowledge of the insured.

Eagle Star & Brit. Dominion v. Paddock (1938, D. C. C.) 22 F. Supp. 545, 548;

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K. TRIAL COURT WAS ENTITLED TO REJECT TESTIMONY OF APPELLANT—NEPHEW—HEYSLER RE: WAIVER AND COMPLIANCE.

1. Appellant.

As a party plaintiff, Appellant has an important interest in the result of this case,

Konig v. Lyon (1919) 49 C. A. 113, 116, 192 P. 875.

Appellant was contradicted by his office manager Berenice Zimmerman (149-151) and by his examination under oath on December 29, 1954 (142-3, 125) that a watchman was to be maintained at all times (125, 142-3).

2. Nephew.

Apart from being an immediate relative of Appellant, Nephew owed a duty to Appellant to properly handle his insurance; and, if he was negligent in the case at bar, Nephew could be personally liable to Appellant for his uninsured loss,

Coffey v. Polimerii (1951 9th Cir.) 188 F. 2d 539;

Milton v. Granite State Fire Ins. Co. (1952 10th Cir.) 196 F. 2d 988.

Nephew was contradicted (a) by his signed statement dated 1-25-55 that he discussed unoccupancy with Appellant in 1950 (179), whereas such statement stated he didn't remember the season of the year (190), and, (b) by Mrs. Zimmerman that a watchman was to be maintained at all times (149-151), instead of only having someone living on the premises (181).

3. Clara M. Heysler.

She had been an employee of Nephew since 1949 (153), and would have his best interests in mind. She was contradicted (a) by the written applications dated October 29, 1952, she prepared and sent Appellees Girard and National, wherein she did not state there was any unoccupancy or that the packing plant would not be operated (166-167, Ex. C, 160); and (b) by Roy A. McMillan (243-244).

V.

CONCLUSION.

The burden was upon Appellant to prove he occupied the packing plant as required by the insurance contracts. Appellant has admitted that he knew the phrase "occupied" meant that he had to operate the packing plant; otherwise, there would be no insurance protection, or his insurance would be in jeopardy.

The insurance under the insurance contracts was suspended at the time of this fire either because the building in which the fire originated was unoccupied

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The insurance under the insurance contracts was suspended at the time of this fire either because the building in which the fire originated was unoccupied

for more than 10 consecutive months immediately prior to the fire without any written endorsement permitting unoccupancy beyond such 10 months period; or because a watchman was not maintained at the premises at all times in lieu of such occupancy.

Appellant was chargeable with full knowledge (actual and imputed) that his Nephew Truman B. Stivers' authority, if any, to waive the provisions of the insurance contracts was limited to a writing either in or attached to the policy. The original and renewal policies contained such express limitation. Nephew was Appellant's agent because Appellant made and recognized him as his agent to handle his insurance; further, when Nephew applied to Appellees Queen and State for insurance for Appellant, he applied as Appellant's agent as a matter of law because he was not an agent of Queen or State. Nephew knew the terms of the insurance contracts, and the express limitation on his authority to waive the provisions of such contracts. As Appellant's agent Nephew's knowledge was imputed to Appellant.

There cannot be any waiver of the occupancy provisions because Appellant actually knew and is chargeable with imputable knowledge of the terms of the insurance contracts. One who has such knowledge cannot claim he has been misled. At any time, Appellant could have returned the subject matter of its insurance to its use as an orange packing plant and so restored his insurance; Appellant or his Nephew could have requested written permission to leave it unoccupied beyond the 10 months' period.

Even under Appellant's claim of a watchman's agreement, Appellant did not comply with his oral agreement to keep a watchman at the premises at all times.

Therefore, it is respectfully submitted that the judgment in favor of each Appellee should be affirmed.

Dated, San Francisco, California,
February 1, 1957.

AUGUSTUS CASTRO,
Attorney for Appellees.